# IN THE COURT OF CRIMINAL APPEALS
# OF TEXAS

**NO. WR-59,662-02**

**EX PARTE RIGOBERTO AVILA**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS**
**CAUSE NO. 2000D01342 IN THE 41ST JUDICIAL DISTRICT COURT**
**EL PASO COUNTY**

***Per curiam*.**

**O R D E R**

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.[1]

Applicant was convicted in May 2001 of the capital murder of N. M., a nineteen-month-old child. The offense occurred when Applicant was babysitting N. M. and his

[1] Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

four-year-old brother, D. S., in February 2000. An autopsy revealed that major organs in N. M.'s body had been split in two by considerable blunt-force trauma. The medical examiner reported that N. M. "died of internal bleeding due to massive abdominal trauma resulting from blunt force injury." The evidence at trial showed that N. M. had an abdominal bruise which resembled a shoeprint.

Applicant gave two written statements to police which were introduced at trial. In his first statement, Applicant said that he was in the living room and the boys were in the bedroom when the injury occurred. Applicant said he discovered N. M. lying face-up on the bedroom floor after D. S. called to him and told him that N. M. was not breathing. Applicant then called 911 and performed CPR on N. M. until the paramedics arrived. Applicant said that D. S. later told him that D. S. and N. M. were "wrestling" and D. S. "put his hand over [N. M.'s] mouth and [N. M.] fainted."

In his second statement, Applicant admitted that he went into the bedroom and "stamped on [N. M.] hard" with his foot while N. M. was lying on the floor. Applicant said that "[D. S.] never put his hand on [N. M.'s] mouth and made him stop breathing." Applicant admitted that he "told [D. S.] to say that[.]" Applicant denied this story at trial and claimed that he did not read this statement before he signed it.

Applicant testified at trial that he discovered N. M. was injured after D. S. informed him that N. M. was not breathing. Applicant explained that D. S. did not answer him when Applicant asked him what happened.

D. S. testified at trial that Applicant "stepped on" N. M. "[w]ith his shoe." D. S. also used dolls to demonstrate for the jury how that occurred.

Dr. Juan Contin, the medical examiner who conducted N. M.'s autopsy, and Dr. George Raschbaum, the pediatric surgeon who operated on N. M., testified for the State. Both Contin and Raschbaum testified that they did not think N. M.'s injury was accidentally inflicted. They testified that it would take "strong" or "considerable" force to cause the injury, which was the type of injury they had previously seen in "traffic accidents" or "high speed accidents." When Raschbaum was asked if a four-year-old child was capable of causing the injury, he replied that it would be "unlikely," but "if you go from a height of 20 feet and you drop somebody, I guess it's a possibility."

Dr. Fausto Rodriguez, a forensic pathologist who conducted a second autopsy of N. M.'s body, testified for the defense. He testified that N. M. died from "[m]assive injuries to the abdominal organs secondary to the blunt force trauma to the abdomen." He opined that the injuries "could be explained by a single traumatic event." However, he could not determine whether or not it was an accident.

The jury convicted Applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071, and the trial court, accordingly, set punishment at death. Art. 37.071, § 2(g). This Court affirmed applicant's conviction and sentence on direct appeal. *Avila v. State,* No. AP-74,142 (Tex. Crim. App. July 2, 2003) (not designated for publication).

Applicant filed his initial post-conviction application for writ of habeas corpus in the convicting court on May 19, 2003. This Court denied relief. *Ex parte Avila,* No. WR-59,662-01 (Tex. Crim. App. Sept. 29, 2004) (not designated for publication). Applicant then petitioned for a federal writ of habeas corpus, which was ultimately denied. *Avila v. Quarterman,* 499 F. Supp. 2d 713, 775 (W.D. Tex. 2007), *affirmed in part and reversed in part, certificate of appealability denied,* 560 F.3d 299 (5th Cir. 2009).

On September 6, 2013, Applicant filed in the trial court this subsequent habeas application, in which he raised three claims:

1. Applicant has newly available scientific evidence entitling him to relief.

2. Applicant was convicted on the basis of false and misleading scientific evidence at trial, in violation of due process.

3. Applicant is actually innocent of capital murder.

Specifically, Applicant has presented evidence from a biomechanical engineer, a physicist, and forensic pathologists as "newly available scientific evidence" to show that D. S. could have caused N. M.'s injury by jumping from a height of eighteen inches and landing on N. M.'s abdomen.[2] *See* Art. 11.073. Applicant asserts that this evidence proves that Contin and Raschbaum gave false or misleading trial testimony regarding "the level of force necessary to cause the infant's fatal injuries." Finally, Applicant asserts

---

[2] Dr. Chris Van Ee, a biomechanical engineer, conducted an experiment to simulate what would have happened if D. S. had jumped from a bed and landed on N. M.'s abdomen. Using crime scene photos and measurements provided by apartment complex employees, Van Ee estimated that the bed in the room where the injury occurred was eighteen inches high.

that he is actually innocent of capital murder in light of the "newly available scientific evidence."

On March 9, 2016, we held that Applicant "alleged prima facie facts sufficient to invoke Article 11.073." Therefore, we held that the application "satisfie[d] the requirements of Article 11.071, Section 5(a)," and we remanded the cause to the convicting court "for consideration on the merits." After holding a hearing in March 2017, the trial court signed findings of fact and conclusions of law recommending that relief be granted on Claims 1 and 2. We disagree.

With regard to Claim 1, Article 11.073 provides that an applicant is entitled to post-conviction writ relief if he can prove that:

> (1) Relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial;
>
> (2) The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
>
> (3) The court must make findings of the foregoing and also find that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Art. 11.073(b)(1) & (2). When assessing reasonable diligence, "the court shall consider whether the scientific knowledge or method on which the relevant scientific evidence is based" has changed since the date of trial (for a determination with respect to an original application) or the date upon which a previous application was filed (for a determination

made with respect to a subsequent application).[3] Art. 11.073(d).

Under the circumstances presented in this case, Applicant has not demonstrated that, "had the scientific evidence been presented at trial, on the preponderance of the evidence [he] would not have been convicted." Art. 11.073(b)(2). When Contin testified at the habeas hearing and Raschbaum responded in an affidavit, they both stood by their trial testimony. As discussed above, Applicant told police that he "stamped on" N. M., witnesses testified that N. M.'s abdominal bruise resembled a shoeprint, and D. S. testified that Applicant "stepped on" N. M. "[w]ith his shoe." Therefore, based upon our own review, we deny relief on Claim 1.

With regard to Claim 2, Applicant must show by a preponderance of the evidence that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict. *See Ex parte De La Cruz,* 466 S.W.3d 855, 866 (Tex. Crim. App. 2015), *citing Ex parte Weinstein,* 421 S.W.3d 656, 659, 665 (Tex. Crim. App. 2014). We review factual findings concerning whether a witness's testimony is false under a deferential standard, but we review *de novo* the ultimate legal conclusion of whether such testimony was "material." *See Weinstein,* 421 S.W.3d at 664. False testimony is "material" only if there is a "reasonable likelihood" that it affected the judgment of the jury. *Id.* at 665.

---

[3] Applicant filed this subsequent application in 2013, when the original version of Article 11.073 was in effect. In 2015, Article 11.073(d) was amended to read that "the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed[.]"

Both Contin and Raschbaum opined at trial that N. M.'s fatal injury was not the result of an accident, and they continue to stand by their trial testimony. Applicant's habeas experts did not refute the possibility that the injury could have been intentionally inflicted by Applicant. *See Ex parte Robbins,* 360 S.W.3d 446, 460-462 (Tex. Crim. App. 2011)(holding that medical examiner's trial testimony was not false "when neither she nor any other medical expert [could] exclude her original opinion as the possible cause and manner of death"). However, even if we assume that the complained-of testimony was false or misleading, it was not material. Even if the boys had been "wrestling" in the bedroom, that does not necessarily mean that D. S. jumped from the bed onto N. M. Applicant did not tell police that D. S. jumped from the bed, nor did D. S. testify to that effect. Applicant admitted to police that he "stamped on" N. M., and D. S.'s trial testimony and other evidence supported that verison of events. Based upon our own review, we deny relief on Claim 2.

Finally, we turn to Applicant's actual innocence claim. To obtain relief, Applicant has a "Herculean" burden to prove by clear and convincing evidence that no reasonable juror would have convicted him based on the new evidence. *Ex parte Elizondo,* 947 S.W.2d 202, 210 (Tex. Crim. App. 1996); *Ex parte Brown,* 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). The trial court concluded that Applicant failed to meet this burden. We adopt the trial court's conclusion that Applicant is not entitled to relief on Claim 3. Based upon the trial court's findings and conclusions and our own review, we deny relief

on Claim 3.

IT IS SO ORDERED THIS THE 11th DAY OF MARCH, 2020.

Do Not Publish